Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-754

UNIT, INC.,
FREIDCO OF WILMINGTON, DELAWARE, LTD.,

Petitioners,

v.

ROBERT E. HICKMAN,
HARRY B. TINGLE,
FARMERS BANK OF THE STATE OF DELAWARE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November 3, 1978

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Unit, Inc. and Freidco of Wilmington, Delaware, Ltd. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 7, 1978.

OPINION BELOW

No opinion was rendered by the Court of Appeals; the judgment order appears in the appendix hereto. The opinion of the District Court for the District of Delaware, which has not been reported, appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 7, 1978. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. May the exercise by a Bankruptcy Court, sitting in the Sixth Circuit, of its exclusive statutory jurisdiction, properly be restricted through the entry of a preliminary injunction by a District Court, sitting in bankruptcy in the Third Circuit, which is holding proceedings involving a related debtor?

2. Did the Third Circuit so far sanction a departure by the District Court from the accepted and usual course of judicial proceedings to call for an exercise of the Supreme Court's power of supervision, when it permitted the District Court to enter a preliminary injunction: (a) which prevented a United States Bankruptcy Judge from exercising his statutory jurisdiction over a case properly before him; (b) which failed to comply with Rule 65 (d), Fed. R. Civ. P. and this Court's decisions in *Schmidt* v. *Lessard,* 414 U.S. 473 (1974) and *International Longshoremen's Association* v. *Philadelphia Marine Trade Association,* 389 U.S. 64 (1967); and (c) which failed to provide sufficient security to compensate the estate of petitioner Unit, Inc., and its creditors, for damages suffered in the event the injunction is determined to have been wrongfully entered?

STATUTORY PROVISIONS AND COURT RULES INVOLVED

United States Code, Title 11:

§ 11. Creation of Courts of Bankruptcy and Their Jurisdiction.

(a) The courts of the United States hereinabove defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law or in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they now or may be hereafter held, to—

. . .

(15) Make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

. . .

(19) Transfer cases to other courts of bankruptcy;

. . .

Rules of Bankruptcy Procedure:

Rule 116. Venue and Transfer.

(a) . . .

(b) Transfer of Cases; Dismissal or Retention

When Venue Improper.

(*1*) *When Venue Proper.* Although a petition is filed in accordance with subdivision (a) of this rule, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, in the interest of justice and for the convenience of the parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

(*2*) *When Venue Improper.* If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

(c) Procedure When Petitions Involving the Same Bankrupt or Related Bankrupts Are Filed in Different Courts. If petitions commencing bankruptcy cases or a bankruptcy case and any other case under the Act are filed in different districts by or against (1) the same bankrupt, or (2) a partnership and one or more of its general partners, or (3) 2 or more general partners, or (4) a bankrupt and an affiliate, the court in which the first petition is filed shall, after hearing on motion and notice to the petitioners and such other persons as the court may designate, determine the court or courts in which the case or cases

should proceed in the interest of justice and for the convenience of the parties. The proceedings on the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. Thereafter all the courts in which petitions have been filed shall proceed in accordance with the determination.

(d) . . .

Rules of Bankruptcy Procedure:

Rule 928. Jurisdiction Unaffected.

These rules shall not be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter.

Federal Rules of Civil Procedure:

Rule 65. Injunction.

. . .

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

. . .

STATEMENT OF THE CASE

On February 3, 1975, a petition for arrangement under the provisions of Chapter XII of the Bankruptcy Act was filed in the United States District Court for the Southern District ot Ohio, Western Division, by Main & Akard, Ltd. Main & Akard is a Texas limited partnership, with Unit, Inc., a Texas corporation with its principal place of business in Cincinnati, Ohio, as its general partner. This case was transferred to the Northern District of Texas on August 18, 1975 and subsequently was amended to conform to the provisions of Chapter XI of the Act.

On September 18, 1975, a petition for arrangement under the provisions of Chapter XII of the Act was filed by Freidco of Wilmington, Delaware, Ltd. ("Freidco") in the Northern District of Texas, and on September 26, 1975, Unit, Inc. ("Unit") filed a petition for arrangement under the provisions of Chapter XI of the Act in the Southern District of Ohio, Western Division. Unit is currently the sole general partner of Freidco, although this is a matter of contention whose resolution is still pending below. Unit owns at least seventy-one percent of Freidco. On October 21, 1975, the bankruptcy judge for the Northern District of Texas entered an order transferring the Freidco proceedings to the District of Delaware, pursuant to Bankruptcy Rule 116 (b).

On October 30, 1975, Unit filed a motion, pursuant to Bankruptcy Rule 116 (c), in the Southern District of Ohio, seeking consolidation, in that District, of the Unit proceeding with the proceedings involving Freidco and Main & Akard. Respondents appeared in opposition to Unit's motion and filed briefs in support of their contention that the court had no jurisdiction to enter a consolidation order. On January 7, 1976, the Honorable Leonard C. Gartner, Bankruptcy Judge for the Southern District of Ohio, over-

ruled the motions to consolidate on their merits and on February 6, 1976, the Freidco case was received and docketed in the District of Delaware. Since the filing of the Main & Akard petition, several other limited partnerships in which Unit is the general partner have filed petitions for arrangement in the Southern District of Ohio. All of these proceedings, as well as Unit's, were assigned to Bankruptcy Judge Gartner.

From February, 1976 to February, 1977, the Unit and Freidco proceedings pursued independent paths. Unit, on February 1, 1977, assumed the responsibility for managing Freidco's sole asset on behalf of the partnership, and for which it received a management fee. Prior to that date, the asset, an office building, was managed by respondents Hickman and Tingle through Hickman & Company, then a subsidiary of respondent Farmers Bank of the State of Delaware. Because Hickman and Tingle refused to honor their obligation to manage the building after February 1, 1977, Unit was forced to assume that responsibility.

On June 30, 1977, following discovery, extensive briefing, and an evidentiary hearing, the Bankruptcy Judge for the District of Delaware filed an opinion and order appointing a trustee for Freidco's estate. Freidco timely moved for a new trial and/or rehearing of that decision.

Judge Gartner became aware of the appointment of a trustee, and the displacement of Unit as the manager of Freidco's building, from third parties and held a conference with Unit's counsel. The judge was concerned about "the effect on Unit . . . ." During that conference, counsel for Unit inquired whether Judge Gartner might entertain reconsideration of his order denying consolidation of the Freidco case with Unit. Counsel was told to "file a strong application . . . and I will give it some thought." An application was filed by Unit; thereafter, Judge Gartner en-

tered an order agreeing to reconsider the order, following briefing and a hearing.

The order granting reconsideration clearly stated that

> "[t]he Cincinnati Court has no intention of acting as a reviewing agent for the Wilmington Bankruptcy Court. Such is not the purport of this order.
>
> . . . .
>
> It is the intent of this Court that with its general knowledge of the overall Unit problems, a further look at the Freidco-Wilmington situation might be helpful both to this Court and the Court in Wilmington.
>
> Exchanges of ideas are sometimes fruitful . . . ."

The order also contained a direction that Freidco's trustee

> "is hereby stayed from taking any action which will impose expense on Unit, Inc.'s interest in Freidco of Wilmington, Delaware, Ltd. or which will prevent Unit, Inc. from managing the Farmers Bank Building."

That ruling was in anticipation that Judge Gartner's administration of the Unit proceedings would be more difficult and to preserve the status quo so that some arrangement between the Unit and Freidco courts could be consummated.

Respondents viewed Judge Gartner's order as an attack upon the jurisdiction of Freidco's Bankruptcy Court. This precipitated a race to the courthouse in both Delaware and Ohio in an attempt to obtain a restraining order protecting the jurisdiction of the respective courts. Respondents won the race and obtained a temporary restraining order, enjoining Unit and its counsel from "seeking any judicial action or doing any act which has as its purpose, objective or effect interfering" with further proceedings in the District of Delaware. This restraining order was vacated

the following morning, but Freidco's Bankruptcy Judge entered a new temporary restraining order, on respondents' oral application, a few hours later.

A *sua sponte* order entered without knowledge of the second restraining order by Judge Gartner four days later, which directed Freidco's trustee to show cause why he should be allowed to interfere with Unit's management contract with Freidco, resulted in an application for a preliminary injunction before the District Court for the District of Delaware. Pending a hearing on that motion, Judge Gartner's *sua sponte* ruling was vacated.

The District Court found, *inter alia,* that:

> "Judge Gartner took this action [entered his order of July 14, 1977] because he felt the appointment of a trustee was unwarranted and might make his administration of the Unit Chapter XI proceeding more difficult."

The District Court concluded that Judge Gartner had no jurisdiction to determine the issue of consolidation raised by Unit's motion for reconsideration and further concluded that the attempt to make such a determination constituted "duplicitous and unnecessary litigation [and] irreparable injury which will support the issuance of a preliminary injunction."

That injunction was entered upon the posting of a $20.00 appeal bond. The injunction provided that Freidco, Unit and Judge Gartner were preliminarily enjoined from taking any action which would purport to limit Freidco's trustee in any way "from any act which [the trustee] considers to be within his powers" and from taking any action which might be construed as "[a]ttempting in any way to interfere with [the District] Court's exclusive jurisdiction" of Freidco's estate. Any proposed action which petitioners

or Judge Gartner determined to be within their proper jurisdiction, and which would have the proscribed effect, could only be taken by "first obtaining, after fair notice, the prior approval of [the District] Court" for the District of Delaware.

The Court of Appeals for the Third Circuit affirmed for the reasons set forth in the opinion of the District Court, finding its scope of review to be limited.

REASON FOR GRANTING THE WRIT

I The Decisions of the Courts Below Raise Significant and Recurring Problems Concerning Control Over Related Cases in Different Courts and the Manner in which that Control is Exercised

This case raises an important issue regarding the administration of related, but unconsolidated, arrangement estates under the rehabilitation chapters of the Bankruptcy Act, which estates are concurrently proceeding in separate judicial circuits. Section 2a (15) of the Bankruptcy Act, 11 U.S.C. § 11 (a) (15), provides that a court of bankruptcy possesses the jurisdiction to

> "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act . . . ."

In this instance the courts below have determined that this provision allows one arrangement court to enjoin another from exercising its full statutory jurisdiction, which impairs the ability of that court to attain the goals of the arrangement chapters of the Bankruptcy Act.

The rehabilitation chapters of the Bankruptcy Act are designed "to avoid unnecessary and premature liquidation." *Claridge Apartments Co.* v. *C. I. R.*, 323 U.S. 141, 149 (1944). See also *Nicholas* v. *United States*, 378 U.S. 678 (1966); *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976) (Chapter XI); *In re Colonial Realty Investment Co.*, 516 F.2d 158 (1st Cir. 1975) (Chapter XII). This is consistent with the view that the Act "is of public as well as private interest . . . ." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1944).

To accomplish the purpose of the rehabilitation chapters, Congress invested the courts of bankruptcy with very broad, though not unlimited, jurisdictional powers. *Callaway* v. *Benton*, 336 U.S. 132 (1949). As a result of the breadth of the jurisdictional grant, two or more courts of bankruptcy have, at times, found themselves administering the assets of a single debtor, see, e.g., *Haas* v. *Gerstel*, 134 F.2d 803 (5th Cir. 1943); *Jackson* v. *Lynch*, 111 F.2d 1003 (9th Cir. 1940), or, of two or more related debtors. See *In re Imperial "400" National, Inc.*, 429 F.2d 671 (3d Cir. 1970). To resolve these conflicts, statutes and court rules exist to provide courts of bankruptcy with a procedure to ascertain the most appropriate venue for administering related estates.

The decisions below were premised on the basis that Judge Gartner "did not have jurisdiction to decide whether Freidco should be transferred" under Bankruptcy Rule 116 (c). (App. 13) Bankruptcy Rule 116 and its arrangement counterparts, Rules 11-13 and 12-13, relate to venue, not to jurisdiction.[1] See Advisory Committee's Note to Bankruptcy Rule 116. As the Bankruptcy Rules "shall not be construed to extend or limit the jurisdiction of courts

[1] Jurisdiction to transfer cases is conferred by 11 U.S.C. § 11(a)(19).

of bankruptcy," the premise relied upon below was erroneous. Bankruptcy Rule 928. See also *United States* v. *Sherwood*, 312 U.S. 584, 589-90 (1941).

Bankruptcy Rule 116(c), and its arrangement counterparts, was promulgated as a convenient procedural device for consolidating in one court the estates of related debtors. Although the District Court found this Rule to be rigidly circumscribed (App. 10-13), the First Circuit has recently given it a more flexible construction to enhance the ability of its lower courts to carry out the mandate of Bankruptcy Rule 903.[2] *In re Brookhollow Associates*, 575 F.2d 1003 (1st Cir. 1978). Assuming, *arguendo*, that the District Court's construction of Rule 116(c) is correct, there existed no reason to suspect that Judge Gartner, or a court exercising the power of review over him, would not apply it. Compare *Jackson* v. *Lynch*, *supra* with *In re Woodruff*, 121 F.2d 152 (9th Cir. 1941).

The District Court found that a prior application under Rule 116(c) had been filed before Judge Gartner and that the interested parties below had appeared before him in opposition to it. (App. 4-5) Judge Gartner declined to grant that motion to transfer "in the interest of justice and for the convenience of the parties." (App. 6) Judge Gartner was subsequently asked to reconsider that ruling and it was at that time that the proceedings which resulted in the injunction commenced. (App. 6-7).

The interested parties chose not to appear before Judge Gartner to resist the renewed motion to transfer. Had they been unsuccessful, those parties would have had the right of review in the District Court and a further appeal

[2] Rule 903 provides: "These rules shall be construed to secure the expeditious and economical administration of every bankrupt estate and the just, speedy, and inexpensive determination of every proceeding in bankruptcy."

to the Court of Appeals. See Chapter VIII of the Bankruptcy Rules; Section 24 of the Bankruptcy Act, 11 U.S.C. § 47. Nevertheless, the District Court imposed an injunction as a substitute for the normal process of bankruptcy proceedings. Cf. *Ex parte Fahey*, 332 U.S. 258 (1957).

The injunction was intended to protect applicants from having to litigate "issues before Judge Gartner in Ohio which he has no jurisdiction to decide." (App. 16-17) This prior restraint deprived Judge Gartner of the one jurisdictional power inherent in the federal courts: jurisdiction to determine a court's own jurisdiction. See *United States* v. *United Mine Workers of America*, 330 U.S. 258, 291, 292 & n.57 (1947); *In re Tax Service Association*, 305 U.S. 160 (1938). Such a result deprives the Bankruptcy Courts of the principal tool to carry out their mission.

Assuming that the District Court possessed the naked power to enter its injunction, its use and terms were not sufficiently circumscribed. Injunctions entered against judges are "drastic and extraordinary remedies [which] should be resorted to only where appeal is a clearly inadequate remedy . . . ." *Ex parte Fahey*, *supra* at 259, 260; see *In re Hurley*, 553 F.2d 1096 (8th Cir. 1977). This rule is especially pertinent where the effect of an injunction will adversely affect a public interest whose impairment cannot be protected by an injunction bond. See *Yakus* v. *United States*, 321 U.S. 414 (1944).

In *International Longshoremen's Association* v. *Philadelphia Marine Trade Association*, 389 U.S. 64 (1967), this Court held that the provisions of Rule 65(d), Fed. R. Civ. P., which requires a court to frame its injunction in specific terms, were to be strictly enforced. The Court concluded that Congress required

> "a federal court frame its orders so that those who must obey them will know what the court intends to require

> and what it means to forbid. [Where] the decree of [the] District Court [is] not so framed, it cannot stand."

Id. at 76; see *Schmidt* v. *Lessard*, 414 U.S. 473 (1974).

The terms of the injunction are not sharply drawn. Any decision by Judge Gartner which would purport to limit Freidco's trustee in any way "from any act which [the trustee] considers to be within his powers" is prohibited. Likewise, any contemplated action which might be construed as an attempt "in any way to interfere with [the District] Court's exclusive jurisdiction" of Freidco's estate is also prohibited. (App. 18, 19) To avoid running afoul of these proscriptions, both Judge Gartner and the Debtor before him must seek permission of the District Court of Delaware to take any contemplated action. (App. 18) Rather than merely protecting the jurisdiction of its Bankruptcy Court, the District Court has assumed control over Judge Gartner's court. Cf. *In re Hurley, supra* at 1102.

The decisions of the courts below will frustrate a bankruptcy court's attempt " 'to secure a prompt and effectual administration and settlement of the estate of all [debtors] within a limited period,' " which is "a chief purpose of the bankruptcy laws . . . ." *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966) (quoting from *Ex parte Christy*, 44 U.S. (3 How) 292, 312 (1845)). They were based upon the erroneous premise that Judge Gartner did not possess jurisdiction to enter an order of transfer under Bankruptcy Rule 116(c). They were based upon a narrow construction of that Rule by the District Court, which deprives the bankruptcy courts of the flexibility necessary to administer arrangement estates as rapidly and economically as is possible.

The injunctive terms exert a chilling effect upon the freedom of a bankruptcy court to administer an estate

properly before it. The bond—$20.00—was clearly insufficient to protect the public interest. *Yakus* v. *United States, supra.* In the absence of Congressional definition, if any court should determine the extent of one bankruptcy court's control over another, it should be this Court. See *Katchen* v. *Landy, supra* at 328.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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November 3, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2426

IN RE:

FREIDCO OF WILMINGTON, DELAWARE, LTD.,
Debtor,

Unit, Inc. and Freidco of Wilmington, Delaware, Ltd.,
Appellants.

**Appeal from the United States District Court
for the District of Delaware
(D.C. In Bankruptcy No. 76-49)**

Argued August 7, 1978
Before: ALDISERT, VAN DUSEN and HUNTER, *Circuit Judges.*

JUDGMENT ORDER

(Dated August 7, 1978)

After consideration of all contentions raised by appellants, and in view of the limited scope of review of the grant of a preliminary injunction, *see e.g., Gillespie & Company of New York, Inc.* v. *Weyerhauser Co.,* 533 F.2d 51 (2d Cir. 1976), and for the reasons set forth in the district court opinion by The Honorable Walter K. Stapleton, BK No. 76-49 (D.Del., filed Sept. 1, 1977), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ ALDISERT
Circuit Judge

Attest:

/s/ M. ELIZABETH FERGUSON
Acting Clerk

STAPLETON, District Judge:

This Chapter XII proceeding is before this Court on an appeal from a number of determinations of a Bankruptcy Judge revolving around her appointment of a trustee to manage the debtor's estate. There are two motions before the Court at this time. First, the debtor has moved for a stay pending a determination of its appeal. Second, several parties in interest have applied to this Court for a preliminary injunction to prevent the possibility that a second bankruptcy court will interfere with the proceedings in this Court.

I. STAY PENDING APPEAL

* * *

II. PRELIMINARY INJUNCTION

The second matter before this Court is an application of the Farmers Bank, and Messrs. Hickman and Tingle ("the applicants")[1] for a preliminary injunction restraining Freidco, Unit and the Honorable Leonard Gartner, Bank-

[1] Hickman and Tingle are limited partners of Freidco. Farmers has filed a creditor's claim against Freidco.

ruptcy Judge of the Southern District of Ohio, from seeking or taking any action, other than by way of application to this Court or to a court having appellate jurisdiction over this Court, which would limit or restrain the trustee appointed by this Court or which would interfere with this Court's jurisdiction over the property and affairs of Freidco. An understanding of the relevant issues requires some background concerning the prior proceedings in this case and other related bankruptcy proceedings.

Unit is a general partner of Freidco and claims a 71% interest in that limited partnership. As earlier noted the principal asset of Freidco is the Farmers Bank Building in Wilmington, Delaware. Unit is also a general partner in a number of other limited partnerships which were organized to construct and/or operate unrelated real estate ventures in various cities around the country. One of these is Main & Akard, Ltd., an Ohio limited partnership. The only connection between Freidco and Main & Akard is that Unit holds an interest and is a general partner in each. At all times prior to June 30, 1977, Unit was in control of the management of Freidco. Accordingly, prior to that date, each of the decisions made by Freidco with respect to these proceedings was made on its behalf by Unit. Unit also entered an appearance before the Bankruptcy Court in this proceeding in its own behalf.

On February 3, 1975, Unit filed a Chapter XII petition on behalf of Main & Akard in the Southern District of Ohio. On August 18, 1975, the Main & Akard proceeding was transferred to the Northern District of Texas. On September 18, 1975, Unit, on behalf of Freidco, filed this Chapter XII proceeding in the Northern District of Texas. Eight days later, on September 26, 1975, Unit filed its own Chapter XI proceeding in the Southern District of Ohio. Thus, Unit elected the Bankruptcy Court in the Northern Dis-

trict of Texas for the administration of the Freidco estate and the Bankruptcy Court in the Southern District of Ohio for the administration of the Unit estate.

On September 19, 1975, Unit represented to this Court when seeking to enjoin discovery in an action before the Delaware Court of Chancery that "the United States District Court for the Northern District of Texas has exclusive jurisdiction of the property and business of Freidco of Wilmington Delaware, Ltd. by reason of its having filed a petition under Chapter XII of the Bankruptcy Act". Also on September 19, 1975, Hickman, Tingle, Farmers Bank and the City of Wilmington moved to transfer this Chapter XII proceeding from the Northern District of Texas to the District of Delaware. Unit, on Freidco's behalf, unsuccessfully resisted this motion. On October 21, 1975 Judge Gandy, Bankruptcy Judge in the Northern District of Texas, entered findings of fact and conclusions of law. He concluded, *inter alia*, that:

> In the interest of justice and for the convenience of the parties I should exercise my discretion in entering an order transferring this entire proceeding to the United States District Court for the District of Delaware.

On October 24, 1975, Unit appealed Judge Gandy's decision on transfer to a judge of the United States District Court for the Northern District of Texas. The parties currently before this Court disagree on what has become of this appeal. Unit represents that Judge Gandy's decision was affirmed on appeal; the petitioners assert that the appeal was never pursued and has thus been abandoned. In either event the legal effect is the same.

On October 30, 1975, Unit filed a motion in its Chapter XI proceeding in the Northern District of Ohio to transfer to that district the Freidco Chapter XII matter and another

case pending in the Northern District of Texas. This motion was opposed by Farmers, Hickman and Tingle, who were represented by local Ohio counsel, and was denied by the Ohio court in an order of the Honorable Leonard C. Gartner, Bankruptcy Judge ("Judge Gartner"), dated January 7, 1976. Judge Gartner's Order provided in part:

> 3. The Freidco case, of which limited partnership Unit Inc. is a general partner was originally filed in the Dallas, Texas Bankruptcy Court. Why Texas was selected rather than Ohio or Delaware, this Court is unaware. However, that filing had to have the backing of Unit, Inc. itself, and the decision was — Texas.
>
> 4. In that proceeding there was a motion filed to transfer the case to Wilmington, Delaware, which motion was granted by the Bankruptcy Judge and which is now on review in the District Court at Dallas. For this Court to transfer the proceedings to Ohio, *to reconsider the Texas request* to transfer to Delaware, *to usurp in effect, the appellate proceedings in Dallas* would be unwarranted judicial duplication. Here again, it is not only the convenience of the management of Unit, Inc. that is involved, but also the requests of the creditors of Freidco, Ltd.
>
> Hence, under the general philosophy of Bankruptcy Rule 116 adopted by Bankruptcy Rule 12-14(c), the Court overrules the motion to transfer in the interest of justice and for the convenience of the parties. (Emphasis supplied)

With the decision as to the appropriate forum for the Freidco Chapter XII proceeding apparently settled, the parties went forward before the Honorable Helen J. Balick, Bankruptcy Judge of this Court. Unit, acting on behalf of Freidco, thereafter presented a proposed plan of arrangement to this Court. Hickman, Tingle and others made a motion for the appointment of a trustee which was vigor-

ously opposed by Unit and Freidco. In these proceedings, the opponents of the application expressly acknowledged this Court's authority to appoint a trustee but insisted that such power should not be exercised. The period from February 1976 through June 30, 1977 saw substantial discovery, a five day trial, post-trial briefing and a period of deliberation on the trusteeship issue. At no point during this period did Unit or Freidco ask this Court to review the determination of the original Chapter XII court that this proceeding should be administered in Delaware, nor did it hint that the Ohio Bankruptcy Court was or ought to be involved in the proceedings relating to appointment of a trustee.

On June 30, 1977, Judge Balick issued her Opinion and Order granting the appointment of a trustee. On July 1, the trustee duly qualified by posting a bond and on July 11, the Court entered a further Order stating in detail the powers of the trustee.

At some point prior to July 14, 1977, Judge Gartner received Judge Balick's Opinion. Thereafter, he conferred with Unit's lead counsel, Mr. Unger. Mr. Unger told Judge Gartner that things didn't "look good" for Unit in Delaware and asked if Judge Gartner would reconsider his order of January 7, 1976 and transfer the Freidco proceeding to Ohio. Judge Gartner requested Mr. Unger to file "a strong" application for reconsideration. On July 14, 1977, Judge Gartner, without notice to the counsel who had appeared in the earlier proceedings for Farmers, Hickman and Tingle, entered an order vacating his order of January 6, 1976 and setting a schedule for briefing and argument on the issue of whether this proceeding should be transferred to Ohio. This order describes the trustee appointed by Judge Balick as the "purported Chapter XII trustee in Freidco Wilmington" and directs that he "is

hereby stayed from taking any action which will impose expense on Unit, Inc.'s interest in Freidco of Wilmington, Delaware, Ltd. or which will prevent Unit, Inc. from managing the Farmers Bank Building". Judge Gartner took this action because he felt the appointment of a trustee was unwarranted and might make his administration of the Unit Chapter XI proceeding more difficult. He wanted to preserve the status quo in the hope that something could be "worked out".[2] Although not expressly stated in his order, Judge Gartner testified that he intended the restraint imposed without notice on the trustee to expire in ten days. He further indicated, with commendable candor, that if the case were transferred to Ohio he would take a "second look" at the need for a trustee.

A hearing before the Honorable David S. Porter, United States District Judge for the Southern District of Ohio, was scheduled for July 20, 1977, although it is not currently clear whether at Judge Gartner or Mr. Unger's request. Mr. Unger prepared a form of temporary restraining order for presentation at that time which would stay "all proceedings and parties in interest from taking any further action in the Matter of Freidco of Wilmington Delaware, Ltd." pending further order of the Ohio District Court. When notice of the hearing before Judge Porter was given to local counsel for Hickman, Tingle and Farmers, they sought and obtained from this Court a narrow restraining order enjoining Unit from seeking any judicial action which would have the effect of interfering with the presentation before Judge Balick of several matters then scheduled for presentation on July 22nd. Judge Porter, when advised of this Court's action, declined to go forward and denied the application for a temporary restraining order.

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[2] Judge Gartner testified to these facts before this Court at the hearing on the application for a preliminary injunction.

On July 22, 1977, Judge Balick in the presence of Unit's counsel signed a temporary restraining order which provided in part:

> 1. The debtor, its general partner Unit and their respective officers, directors, agents and attorneys, and all persons acting in concert with them or any of them, are hereby restrained, until the Court enters its Orders embodying its decision of the aforesaid Motion for Injunctive Relief, from taking any of the following actions:
>
> (a) Seeking any judicial action or doing any act, proceeding or thing which has as its purpose, objective or effect any interference with or limitation of the rights and powers of Peter J. Walsh, Esquire ("the Trustee") to possess, manage and operate the estate of the debtor pursuant to the Orders of this Court, or any interference with this Court's exclusive jurisdiction of the estate of the debtor.
>
> (b) Seeking any judicial action or doing any act, proceeding or thing which has as its purpose, objective or effect to call into question or relitigate in any forum any issue determined in the course of this Chapter XII proceeding.

Four days later, on July 26, 1977, Judge Gartner, without having knowledge of Judge Balick's Order and without giving notice to Hickman, Tingle, Farmers or the trustee, entered an order directing the trustee to appear in Cincinnati on August 11 to "show cause". In part this *ex parte* Order states:

> The management arrangement of Unit, Inc. for the Farmers Bank Building in Wilmington, Delaware is property of the debtor [Unit] until this Court can be shown to the contrary. It is a valuable asset to its estate and anyone interfering with that operation is answerable to this Court. See definition of "Property", Blacks Law Dictionary, 1968 Ed. (Revised 4th).[3]

The direction to the trustee to appear in Cincinnati was subsequently vacated pending a hearing before this Court on Freidco's application for a stay pending appeal and this application for a preliminary injunction.

The threshold question is whether the determinations thus far made in this proceeding are subject to collateral attack, either directly or indirectly, before Judge Gartner in the Southern District of Ohio. The applicants argue, first of all, that Freidco and Unit have litigated the question of the appropriate forum for this proceeding before Judge Gandy, that Judge Gandy decided that he had jurisdiction to make a determination on that issue, that he decided that Delaware was the appropriate forum, that this ruling has never been reversed on appeal, and that Unit is,

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[3] Unit refers upon occasion to a "management contract" giving Unit a continuing right to manage the Farmers Bank Building on behalf of Freidco. I can find no "management contract" per se in the record of this proceeding. The record suggests that Unit managed the building from February 1, 1977 to June 30, 1977 for $2,500 per month under an interim agreement pending Judge Balick's decision on the motion for the appointment of a trustee. During the proceedings on that motion Freidco and Unit urged that Unit had a right to manage the building under the terms of *the partnership agreement*. (Br. of Debtor in Opposition to Motion filed August 2, 1976). However, any right which Unit may have had under that agreement to manage part or all of the assets of Freidco terminated on July 11, 1977 when Judge Balick authorized the trustee "to operate the business and manage the property of said debtor, until the further order of this Court." Under Section 445 of the Act and Rule 12-22, once the debtor-in-possession is replaced by a trustee authorized to conduct its affairs, a party authorized to manage the partnership affairs under the partnership agreement has no more management authority than the board of directors of a corporate debtor has under the corporate charter or by-laws once a trustee is appointed to manage its affairs and property. It follows that the "management arrangement" referred to by Judge Gartner did not constitute "property" of Unit on July 22, 1977.

accordingly, barred, under doctrines of estoppel and law of the case, from relitigating that issue before the Southern District of Ohio. I agree. While it may be that changed circumstances might justify asking the Court which succeeded to the jurisdiction exercised by Judge Gandy to review his determination, this Court, which so acquired jurisdiction, has neither been asked to review that determination nor has it been referred to any change of circumstances relating to "the interest of justice" or "the convenience of the parties". It is apparent that Unit seeks review in Ohio simply because it disagrees with Judge Balick's determination that a trustee be appointed. Since this is the problem, Unit's appropriate remedy, which it is pursuing, is by way of appeal to this Court.

This bar to collateral attack by Unit is binding whether or not Judge Gandy in fact had jurisdiction to make his determination. If Unit believed there was no jurisdiction it should have pressed that issue in its appeal from Judge Gandy's transfer order. Since it did not, it cannot now complain after two years of litigation in this Court.

There are, however, other reasons why the prior determinations in the proceeding cannot be attacked in the Southern District of Ohio at Unit's behest, at the behest of any other interested party, or *sua sponte*. Under the applicable law, the Texas court had jurisdiction to determine the forum for this proceeding and this Court succeeded to that jurisdiction. Under that law the Southern District of Ohio lacked jurisdiction in January of 1976, and presently lacks jurisdiction, to make that determination.

> Bankruptcy Rule 116 (c) provides, in pertinent part:
>
> If petitions commencing bankruptcy cases or a bankruptcy case and any other case under the Act are filed in different districts by or against . . . (2) a partnership and one or more of its general partners, or . . . (4) a bankrupt and an affiliate, the court in which the first petition is filed shall, after hearing on motion and notice to the petitioners and such other persons as the court may designate, determine the court or courts in which the case or cases should proceed in the interest of justice and for the convenience of the parties.

The issue under Rule 116 (c) is which court is the "court in which the first petition is filed", and thus has jurisdiction to determine the forum issue.

Freidco and Unit contend that Main & Akard and Freidco are "affiliates", and thus that, since Main & Akard's Ohio petition was the first petition filed, the Ohio court meets the "first filed" requirement and is the proper court to determine the forum issue. Under this interpretation, Judge Gartner had jurisdiction to determine the forum issue in 1976 and, according to Freidco and Unit, may reconsider that decision now. "Affiliate", however, is defined by Bankruptcy Rule 901 (3), which states, in pertinent part:

> "Affiliate" of a bankrupt means . . . (B) *a person* who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the bankrupt, or (C) *a corporation* 25 per cent or more of whose outstanding voting securities are directly or indirectly owner, controlled, or held with power to vote, by a person who directly or indirectly owns, controls, or holds with power to vote, 25 per cent or more of the outstanding voting securities of the bankrupt, or (D) *a person* substantially all of whose property is operated under lease or operating agreement by the bankrupt, . . .

Unit does own 25% or more of the interests of both Freidco and Main & Akard. However, under Rule 901 (3) (c), Main & Akard is an affiliate of Freidco only if it is a "cor-

poration" within the definition of the Bankruptcy Act. Section 1 (8) of the Act, 11 U.S.C. § 1 (8), defines "corporation" in the following manner:

> . . . all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument;[4]

Since neither Main & Akard nor Freidco fit within this description of "corporation",[5] they are not affiliates of one another.[6] Since Main & Akard and Freidco are not affiliates, the Ohio court does not have authority to determine the transfer of Freidco.

Under the terms of Rule 116 (c) (2), the only related proceeding is Unit's, since Unit is a general partner of Freidco. The court in which the first petition was filed as between Freidco and Unit would thus seem to have jurisdiction to determine the transfer of Freidco. Since the Freidco proceeding was filed in Texas a week before the

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[4] Section 1 defines "person" so as to include partnership associations other than those included within the definition of "corporation."

[5] The parties concede that neither Main & Akard nor Freidco are "partnership associations organized under laws making the capital subscribed alone reasonable for the debts of the association." Since Rule 901(3)(B), (D) and (E) all use the term "person" rather than "'corporation," it seems clear that the drafters intended "corporation" in Section 901(3)(C) to have a special meaning in that context. *See also* the Advisory Committee Notes —" . . . the definition explicitly recognizes that an affiliate of the bankrupt may include a corporation having a common parent with the bankrupt . . . ".

[6] Although both Main & Akard and Freidco are affiliates of Unit, they are not affiliates of one another.

Unit proceeding was filed in Ohio, the Ohio Court did not have jurisdiction to decide whether Freidco should be transferred.

The purpose of Rule 116 (c) is to confer upon one court, and one court only, the jurisdiction and responsibility to determine where and how related bankruptcy proceedings should proceed. As this case amply demonstrates, it is of the utmost importance that parties be able to identify the court intended to make that decision. For this reason liberties should not be taken with its construction. It is carefully worded and it defines its own terms with precision. Applying the rule by its own terms to this case it is apparent that the Southern District of Ohio has no jurisdiction to determine where Freidco's Chapter XII proceeding should be administered.

Moreover, the theory upon which Unit and Judge Gartner are apparently proceeding does not lead to the conclusion which they have reached. When the filing of the Freidco proceeding in Texas on September 18, 1975 first rendered Rule 116 (c) applicable under that theory, the Main & Akard Chapter XII proceeding had already been transferred to Texas. If the releationship between Freidco and Main & Akard were legally relevant, it makes no sense to say that a court which had no jurisdiction over either proceeding was the appropriate court to make the forum decision. As of September 18, 1975, the Texas court had succeeded to the jurisdiction of the Ohio court in the Main & Akard matter and a reasonable construction of Rule 116 (c) would place the jurisdiction to determine the forum issue in Texas.

In fact, the only thing which gives surface appeal to an argument in favor of the Southern District of Ohio is the pendency there of the Unit proceeding. But, as earlier noted, appying Rule 116 (c) in the context of Freidco and

its general partner Unit, the Texas court indisputably acquired jurisdiction first. And this Court has now succeeded to that jurisdiction. It follows that Judge Gartner has no jurisdiction under any tenable theory to decide whether the administration of the estate of Freidco should be transferred from Delaware to Ohio. It also follows *a fortiori* that he has no jurisdiction to control the trustee appointed by this Court in his administration of the assets and affairs of Freidco.[7]

In reaching these conclusions, I am not unmindful of the Third Circuit's decision in *In re Imperial "400" National, Inc.*, 429 F.2d 671 (3rd Cir. 1970). In that case, Imperial "400" National, Inc. was in a Chapter X proceeding in the District of New Jersey. Three years after the appointment of a trustee there, two partners of a limited partnership in which Imperial held a 75% interest as general partner filed a Chapter X petition on behalf of the partnership in the Western District of Michigan. The New Jersey court enjoined the Michigan proceeding and ordered it transferred and consolidated with the New Jersey proceeding. That action was affirmed by the Third Circuit.

At the time *Imperial* was decided, Rule 116(c) had not yet been adopted. The court held that Section 32(a) of the Bankruptcy Act was applicable and that it authorized "the court first acquiring jurisdiction" to transfer and consolidate the Michigan proceeding "in the court which can proceed . . . with the greatest convenience of the parties in interest." 429 F.2d at 679. Since the appellants did not contend that the transfer and consolidation was not "for the greatest convenience of the parties", the court found "no

[7] This is not, of course, to say that Judge Gartner has no jurisdiction over Unit's *interest* in Freidco as its general partner. He has exclusive jurisdiction over all of Unit's assets.

reason to upset the determination of the New Jersey District Court that this was so." 429 F.2d at 679.

In the course of its opinion the Third Circuit rejected the appellants' contention that the New Jersey court did not have *jurisdiction* to administer the assets of the limited partnership in the Imperial proceeding, noting that traditional property concepts need not be applied when to do so would frustrate the ability of the Reorganization Court to effectuate the purposes of the Bankruptcy Act. The application of this principle was found to be appropriate on the facts presented in the *Imperial* case. The court recognized that "the problem in the case stem[med] to a considerable extent from the form of Imperial's business organization". 429 F.2d at 676. Imperial's business was the operation of a chain of 116 standardized motels. The motels were uniform in architecture, design, color coordination and appearance. The operation was also standardized in terms of rates, budgets, advertising, etc. Each motel in the chain was dependent upon the existence of the chain and the nationwide referrals and advertising. In those circumstances the court concluded that a complete reorganization of the affairs of Imperial could not be accomplished "in one proceeding if each individual partnership must be liquidated in different courts". 429 F.2d at 676.

I do not understand the application before me to deal with whether the Southern District of Ohio would have *jurisdiction* to administer the affairs of Freidco as a part of the Unit proceeding if the Freidco proceeding were before it.[8] The question posed by the present application for an injunction is rather *which court* has the power to decide how and where the Freidco matter will be administered. In the *Imperial* case, the New Jersey court, as the court first acquiring jurisdiction, had the power to decide this

[8] See Section 5(d) of the Bankruptcy Act.

question with respect to the Michigan proceeding, under Section 32 (a) of the Act. In this case, Rule 116 (c) is the authority intended to resolve questions of the kind here presented and that rule makes it the duty of this Court, upon appropriate application, to determine how and where the Freidco matter should go forward. No such application has been made and the question of whether, on the facts of this case,[9] Freidco should be transferred and/or consolidated is, accordingly, not before me. The importance of the conclusion that this Court has the decision-making authority, however, stems from the fact that Rule 116 (c) is designed to place that power in only one court. It follows that the *Imperial* case provides no support for the proposition that the Southern District of Ohio has the power to transfer and/or consolidate the Freidco matter.

There is no dispute that this Court has jurisdiction of Freidco's Chapter XII proceeding. It has exercised that jurisdiction for almost two years, determining among other things that a trustee should be appointed. As a result of that determination, Judge Gartner has decided to relitigate the questions of whether this matter should be transferred to the Southern District of Ohio and whether a "second look" should be taken at the wisdom of that appointment. In the interim, he has issued orders purporting to restrict the trustee in the exercise of the duties imposed upon him by this Court. In these circumstances, I believe that the present record indicates that the applicants are likely to succeed on their contention that they and the trustee are entitled to protection from having to relitigate issues before Judge Gartner in Ohio which he has no jurisdiction to

[9] As noted earlier, the ventures of the limited partnerships in which Unit has an interest are independent ventures. By the deliberate choice of Unit, separate petitions have been filed in various jurisdictions and those proceedings have continued as separate administrations, several to successful conclusions.

decide. The burden of such duplicitous and unnecessary litigation constitutes irreparable injury which will support the issuance of a preliminary injunction. In short, the present record suggests that if "second looks" are to be taken, they should be taken by this Court or a court having appellate jurisdiction over this Court. An appropriate preliminary injunction will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BK No. 76-49

In The Matter of

FREIDCO OF WILMINGTON DELAWARE, LTD.,
a limited partnership,

Debtor,

ROBERT E. HICKMAN and HARRY B. TINGLE,

Plaintiffs,

v.

UNIT, INC., FREIDCO OF WILMINGTON DELAWARE, LTD., HONORABLE LEONARD C. GARTNER, Bankruptcy Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO,

Defendants.

PRELIMINARY INJUNCTION

THIS 1st day of September, 1977, for the reasons stated in the Opinion filed herewith and pursuant to the authority conferred by Section 2a (15) and 402 of the Bankruptcy Act (11 U.S.C. §§ 11a (15) and 802), Bankruptcy Rules 12-60 (a) (4) and 765, Federal Rule of Civil Procedure 65, and this Court's inherent power to protect its jurisdiction,

NOW, therefore, IT IS ORDERED:

1. Freidco of Wilmington Delaware, Ltd., Unit, Inc., and their respective officers, directors, agents and attorneys, and all persons acting in concert with them or any of them, and Honorable Leonard C. Gartner, Bankruptcy Judge of the United States District Court for the Southern District of Ohio, are hereby preliminarily enjoined from taking, initiating or participating in any of the following actions without first obtaining, after fair notice, the prior approval of this Court:

(a) Making, entertaining or granting any application, or taking or initiating any judicial or other action, which would purport in any way to limit or restrain Peter J. Walsh, Esquire or any successor Trustee of the estate of Freidco of Wilmington Delaware, Ltd. ("the Trustee") from any act which the Trustee considers to be within his powers as Trustee of the estate of Freidco of Wilmington, Delaware, Ltd. under the Orders of this Court.

(b) Making, entertaining or granting any application, or taking or initiating any judicial or other action which would purport in any way to limit or delay the Trustee, Robert E. Hickman, Harry B. Tingle, Farmers Bank of the State of Delaware or any attorney for any of them in making any application to this Court, or in offering any evidence or argument in support of any application to this Court, or to delay or prevent this Court's consideration and determination of any application herein.

(c) Hearing, conducting or participating in any proceeding pursuant to the "Order Requiring Peter J. Walsh, Esquire To Appear And Show Cause; Suggesting Robert E. Hickman And Harry B. Tingle Do Likewise And Comments" entered by Judge Gartner on July 26, 1977 *In the Matter of Unit, Inc.*, Bankruptcy No. B-1-75-1989 in the United States District Court for the Southern District of Ohio, Western Division, or seeking or granting any sanction against anyone who does not participate as therein ordered and suggested, or attempting to determine any matter stated therein, or conducting the hearing therein scheduled.

(d) Hearing, conducting or participating in any proceeding pursuant to the Order relating to the proposed transfer of this proceeding entered by Judge Gartner on July 14, 1977 *In the Matter of Unit, Inc.*, Bankruptcy No. B-1-75-1989 in the United States District Court for the Southern District of Ohio, Western Division, including filing of any briefs, or requiring anyone to file any briefs, in connection with the brief schedule stated therein, or the conducting of the hearing stated therein, or seeking or issuing any Order with respect to the transfer of this Chapter XII proceeding.

(e) Seeking or taking any judicial action which has as its purpose, objective or effect to call into question or relitigate any issue determined in the course of this Chapter XII proceeding. This includes, without limitation, the determinations in this Chapter XII proceeding that the United States District Court for the Southern District of Ohio lacks jurisdiction to transfer this proceeding, and that all rights of Unit with respect to the control of Freidco of Wilmington Delaware, Ltd. and the management of the Farmers Bank Building have expired.

(f) Attempting in any way to interfere with this Court's exclusive jurisdiction of the estate of Freidco of Wilmington Delaware, Ltd.

2. This injunction shall not limit anyone in making any application to this Court, or to any other court which acquires exclusive jurisdiction of this Chapter XII proceeding by a completed lawful transfer, nor shall it limit or prevent any application for appellate review of any order entered in this Chapter XII proceeding. The Court retains jurisdiction for the purpose of hearing any application to modify or vacate this injunction which may be appropriate in light of changed circumstances.

3. This Preliminary Injunction shall issue upon the giving of security by plaintiffs of twenty dollars cash, which security has been previously deposited by plaintiffs with the Clerk of this Court as security relating to the Temporary Restraining Order entered herein on July 20, 1977 (now vacated) and which has remained on deposit as security in connection with the Temporary Restraining Order entered herein by Honorable Helen S. Balick on July 22, 1977. This Preliminary Injunction shall accordingly take effect immediately.

4. The Clerk of this Court shall forthwith transmit a certified copy of this Preliminary Injunction and the aforesaid Opinion to Judge Gartner by express mail. The Clerk shall also give telephonic notice of this Preliminary Injunction to Judge Gartner forthwith.

/s/ WALTER K. STAPLETON
United States District Judge